NO. WR-86,920-02

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

IN RE THE STATE OF TEXAS Ex Rel. BRIAN W. WICE, Relator.

ON APPLICATION FOR A WRIT OF MANDAMUS
AGAINST THE FIFTH COURT OF APPEALS
CAUSE NOS. 05-17-00634-CV, 05-17-00635-CV & 05-17-00636-CV

RELATOR'S MOTION FOR REHEARING

TO THE JUDGES OF THE COURT OF CRIMINAL APPEALS:

Relator, Brian W. Wice, Collin County District Attorney Pro Tem, files this Motion for Rehearing in the above-styled and numbered matter.

Introduction

> In this country, our courts are the great levelers. The one place where a man ought to get a square deal is in a courtroom.[1]

If you're fortunate enough to be Texas Attorney General Ken Paxton, you can lawfully create and endow a defense fund to pay for an armada[2] of top-flight legal talent that most defendants can only dream of to defend yourself against three felony offenses. You can lawfully solicit hundreds of thousands of dollars from a cadre of well-heeled friends and political

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[1] Atticus Finch, *To Kill a Mockingbird*, Universal (1962).

[2] According to Paxton's last filing, there are eleven lawyers in his employ in this case.

patrons to stock that defense fund, including a $100,000 gift from James Webb, CEO of a company your agency was investigating for fraud.[3] If you're Ken Paxton, Atticus Finch's words most certainly ring true.

What if you're Relator and all you've ever sought from the time you swore your oath was for Collin County to pay you the reasonable fee it agreed to, so that, in the words of the author of the majority opinion, you would have "the ability to proclaim to the citizens of Texas that the person responsible for a crime has been brought to justice..."[4] What if you're legally prohibited from soliciting from any person "a fee, article of value, compensation, reward, or gift, or a promise of any these" to prosecute Paxton?[5] What if you "had to spend a considerable amount of time, energy, and money engaged in more than one battle over the payment of [your] fees,"[6] and then, given the majority's ruling, will be paid $9.93 an hour for

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[3] Jim Malewitz, *Texas Attorney General Ken Paxton under probe for legal defense gift*, www.texastribune.com (Oct. 5, 2017). The Republican district attorney from Kaufman County, appointed as a special prosecutor to investigate possible claims of bribery, found that Paxton's acceptance of Webb's gift was legal because they had a "personal relationship." Matthew Choi, *District attorney closes probe into Paxton legal defense gift*, www.texastribune.com (Oct. 27, 2017).

[4] *Ex parte Mayhugh*, 512 S.W.3d 285, 307 (Tex.Crim.App. 2016).

[5] Tex. Govt. Code, § 41.004(a).

[6] *In re State of Texas Ex Rel Brian W. Wice v. Fifth Court of Appeals*, ___S.W.3d___, 2018 WL 6072183 at *11 (Tex.Crim.App. November 21, 2018)(Richardson, J., *concurring*). All references to the Court's six opinions will be referred to as "*__."

all your pre-trial work in 2016,[7] a result described as "harsh," "unfair," and "manifestly unjust"[8] and that comes perilously close to Texas' minimum wage? What if you also face the Sword of Damocles because of the "claw back" Commissioners Court has threatened to file "to recoup what it already paid ... for [your] work on the Paxton cases."?[9] Does Atticus Finch's promise of a square deal ring true for you? Not so much.

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[7] As the special prosecution team's appellate lawyer responsible for the lion's share of the 2016 work, Relator billed 320.75 hours. If Collin County's cap of $1,000 for all his pre-trial work is the template for payment, Relator's hourly rate is $9.93; if the cap's $1,000 adjustment is employed, it becomes $18.18. *See* *20 (Alcala, J., *dissenting*)(describing payment comporting with the pre-trial cap as "an amount that no one can seriously contend is reasonable.").

[8] *14, 21, 24 (Alcala, J., *dissenting*). These rates are better described as a "travesty of a mockery of a sham of a mockery of a travesty of two mockeries of a sham." *Bananas*, MGM (1971).

[9] *11 (Richardson, J., *concurring*). Responding to the Commissioners' Draconian threat, Judge Richardson makes a compelling and persuasive legal argument that because "the first payment by the Commissioners Court was a clear ratification of the agreement to pay [the $300 an hour] requested for work already incurred, the Commissioners Court should not be entitled to recoup the fees already paid." *Id.* Moreover, the majority appears to adopt Judge Richardson's conclusion that the Commissioners' ratification of the agreement to pay Relators $300 an hour after being placed on notice as to whether the agreement was valid waived their right to claw back funds already paid to Relators. "The Commissioners Court appears to have already [waived this claim] when it voted to approve the first payment to the appointed prosecutors after rejecting the same statutory arguments presented to this Court in this case." *8 n. 63, *citing Rodgers v. Taylor*, 368 S.W.2d 794, 797 (Tex.Civ.App.– Eastland 1963, writ ref'd n.r.e.)(commissioners court had the power to, and did in fact, ratify allegedly unauthorized agreement with court reporter because it had authority to authorize payment for his services); *Id.* at n. 60, *citing Galveston Cty. v. Gresham*, 220 S.W.2d 560, 563 (Tex.Civ.App. – Galveston 1920, writ ref'd)(commissioners court ratified agreement previously entered into by unauthorized party by accepting services of legal counsel).

Engaging in the statutory interpretation required to harmonize the plain language of Articles 26.05 and 2.07, the majority has seemingly lost sight of what this case is about. While it is painfully clear that "the color of money is the name of the game,"[10] any conceivable allusion to Relators' avarice,[11] is wide of the mark. When it comes to the real "color of money" that drives this case, and the Court's decision to grant rehearing, consider:

- Collin County, Texas' wealthiest major county,[12] spent $8,669,750 in indigent defense in 2016, $8,633,423 in 2017, and budgeted the sum of $9,000,000 in 2018, all without regard to any fees paid to Relators in those fiscal years.[13]

- Commissioner's Court authorized payment of up to $375 an hour to private attorneys the Commissioners Court has engaged to fight paying [Relators] $300 an hour."[14]

- Collin County paid attorney Marc Fratter more than $460,000 in fees for his indigent defense work in 2018, *twice the amount the*

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[10] *13 n. 2 (Yeary, J., *concurring and dissenting*)(citation omitted).

[11] *See id.* at *13. ("Could not some other court presiding over a civil suit addressing these circumstances conclude that the first payment to pro tem counsel – in an amount exceeding $200,000 – was far more sufficient compensation for all the work done so far?").

[12] Collin County ranks third behind three counties with populations totaling less than 1,000. *See* www.mrt.com/ 10-riches-counties-in-Texas-taxpayer.data.

[13] www.collincountytx.gov/budget/Documents/budgets/FY2018AdoptedBudget.pdf. at p. 170.

[14] *11 (Richardson, J., *concurring*).

Special Prosecutors billed in 2016.[15]

- A Collin County district judge who approved most of Fratter's fees opined without irony or regard for Relators tasked with prosecuting his long-time friend and political contemporary, "Those Collin County citizens who are indigent are entitled to have a lawyer who will zealously represent them. *And the lawyers who defend these citizens are entitled to reasonable compensation for the legal services they provide.*"[16]

The real "color of money" that forms the narrative of this case is the King's Ransom spent by Paxton, his millionaire buddy Jeff Blackard,[17] and Commissioners Court, all of whom recognized that this prosecution could not survive for long if it lacked adequate funding. Make no mistake: while it was the *Commissioners* who prevailed in this Court, *Paxton* first recognized that the best, indeed, *only way* to derail his prosecution was to de-fund it by challenging Relators' fees three years ago.[18] Why was he the

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[15] Debra Cassens Weiss, *Texas attorney earned more than $460K representing indigent defendants last year*, www.abajournal.com (Nov. 12, 2018).

[16] Valerie Wigglesworth, *Attorney's eye-popping $460,000 in earnings to defend indigent clients in Collin County prompts changes*, www.dallasnews.com (Nov. 12, 2018) (emphasis added).

[17] The Texas Supreme Court just recently declined to review the court of appeals' dismissal of Blackard's last lawsuit. *Blackard v. Schaffer*, No. 17-0182 (Dec. 14, 2018).

[18] *See* Michael Barajas, "*Stand By Your Man: How the Collin County GOP derailed Ken Paxton's prosecution and turned him into a right-wing hero.*" www.texasobserver.com (Oct. 1, 2018).

first to challenge the fees paid to any special prosecutor?[19] Perhaps as a taxpayer, Paxton wanted to save a few dollars on his 2016 taxes. Perhaps not.[20] Regardless of who gets credit for crafting the stratagem calculated to terminate – with extreme prejudice – Paxton's prosecution, this three-year ploy that could cost Collin County taxpayers more money than Relators now seek "was managed by a job, and a good job too."[21] It is against the unique backdrop of this case where the "x" axis of justice and the "y" axis of politics intersect, that Relator seeks rehearing of a decision, that unless reversed, "Twill be recorded for a precedent, and many an error by the same example will rush into the state: it cannot be."[22]

Rehearing is warranted because the Court did not address Relator's separation of powers and laches claims. Rehearing is warranted because

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[19] As the court of appeals glibly recounted in acknowledging that Paxton's challenge to Rule 4.01B, the safety-valve provision in Collin County fee schedule was the first of its kind, "[F]rom the dearth of litigation on the issue, clearly [Rule 4.01B] functions without controversy – until it doesn't. And it did not here." *In re Collin Cty.*, 528 S.W.3d 807, 813 (Tex.App.– Dallas 2017).

[20] Not surprisingly, Jordan Berry, Paxton's spokesman told the media, "Attorney General Paxton is extremely grateful for the court's decision." Patrick Svitek & Emma Platoff, *Texas Court of Criminal Appeals rules against prosecutors in Ken Paxton payment case*, www.texastribune.com (Nov. 21, 2018).

[21] Gilbert & Sullivan, *Trial by Jury* (1875).

[22] William Shakespeare, *The Merchant of Venice*, Act IV, Scene 1.

the majority erroneously employs the extraordinary remedy of mandamus to sidestep the issue of whether Relator's pre-trial hourly fee of $9.93 is "reasonable," burying the lead with its analysis of a statute "that sets out how the reasonableness[23] of the particular fee at issue is determined."[24] Rehearing is appropriate and imperative because the majority's view of Articles 26.05 & 2.07 deprives indigent-defense counsel and attorneys *pro tem* of the funding essential if the constitutional guarantee of justice for all in our adversarial system means more than simply words on a page.

Argument and Reasons Why Rehearing is Warranted

A. The Court Failed to Address Relator's Separation of Powers Argument

The mandate that the courts of appeals must "show their work" by addressing all issues and arguments advanced by the parties should apply with equal force to this Court. This Court has held that Tex. R. App. P. 47.1,[25] requiring the courts of appeals to "'show their work,' ... maintains

[23] *See In re Perkins*, 512 S.W.3d 424, 432 (Tex.App.– Corpus Christi 2016)(observing that "reasonable" in Article 26.05(a) "connotes a discretionary act rather than a mandatory one" and that "article 26.05 ... recognizes the application of judicial discretion to an award of attorney's fees.").

[24] *5.

[25] The court of appeals must issue an opinion that "addresses every issue raised and necessary to final disposition of the appeal."

the integrity of the system and improves appellate practice."[26]

This Court ignored Relator's argument that the plain text of Article 26.05(c) it relied on to divest trial judges of the inherent discretion to pay reasonable attorneys fees as required by Article 26.05(a), violates the separation of powers doctrine.[27] The majority erroneously concludes that while Articles 26.05(a)-(c) and 2.07(c) are ostensibly equal, 26.05(c) is, in Orwell's words, more equal than the others[28] – at least for purposes of this prosecution – permitting it to invalidate a safety-valve provision in the fee schedules of two-thirds of Texas counties.[29] It fails to heed the warning of Justice John Marshall Harlan "against the dangers of an approach to statutory construction which confines itself to the bare words of a statute for 'literalness may strangle meaning,'"[30] even as it fails to recognize that

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[26] *Sims v. State*, 99 S.W.3d 600, 603-04 (Tex.Crim.App. 2003).

[27] Pet. Mandamus 44-48. Notably, in their myriad pleadings, the Commissioners neither cited nor distinguished any of the authorities Relator relied on to support this claim. *See* n. 31, *infra.*

[28] *29 (Walker, J., *dissenting*)("Thus, when it comes to the actual payment of attorneys pro tem, it seems obvious that article 2.07 and article 26.05(a) take higher precedence than article 26.05(c)).

[29] *21 (Alcala, J., *dissenting*).

[30] *Lynch v. Overholser*, 369 U.S. 705, 710 (1962).

its own authority compels a different result.[31] The majority opines that, "Commissioners courts lost the battle in court to rely upon limits to a trial court's authority to set fees, but they won the war in the Legislature."[32] But its belief does not survive its holding in another politically-charged prosecution: one branch's undue interference with another where the other branch cannot effectively exercise its constitutionally assigned powers violates the separation of powers doctrine.[33]

This Court has held the Supreme Court's mandate of a "reasonably level playing field at trial,"[34] is not subject to the Legislature's preference or predilection; trial courts are tasked with ensuring due process in our

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[31] Pet. Mandamus 47 n. 54, *citing Meshell v. State*, 739 S.W.2d 246, 257 (Tex.Crim.App. 1987)(Speedy Trial Act violated Separation of Powers Clause because it improperly encroached on prosecutorial discretion); *Rose v. State*, 752 S.W2d 529, 531 (Tex.Crim.App. 1987)(parole law jury charge violated Separation of Powers Clause because it unduly interfered with Executive Branch's clemency authority); *Armadillo Bail Bonds v. State*, 802 S.W.3d at 241 (art. 22.16(c)(2) "unduly interferes with the Judiciary's effective exercise of its constitutionally assigned power" and violated Separation of Powers Clause); *Williams v. State*, 707 S.W.2d 40, 45 (Tex.Crim.App. 1986)(statute requiring trial court to remit at least 95 percent of forfeited bond unduly interfered with judiciary's authority over amount of forfeited bond to be remitted and violated Separation of Powers Clause).

[32] *5.

[33] *See Ex parte Perry*, 483 S.W.3d 884, 901-02 (Tex.Crim.App. 2016)("abuse of official capacity" statute violated separation of powers doctrine as applied to sitting governor's veto power).

[34] *Ake v. Oklahoma,* 470 U.S. 68, 76-77 (1985).

adversarial system.[35] While the majority avoids the issue of whether it is unconstitutionally relegating Relators to second-class citizenship[36] by asserting that "any possible constitutional concerns present in an indigent case are not present in this case,"[37] this avowal proves too much. It ignores the fact that what it concludes is the "plain language" of Article 26.05(c), one that would pay Relator the unconscionable hourly rates of $9.93 or $18.18,[38] yields a patently absurd result the Legislature could not have intended. Indeed, the majority never defuses the claim that even if the plain language of Article 26.05(c) is not ambiguous, it should consider "the consequences of [its] particular construction"[39] that clearly portend an

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[35] *De Freece v. State*, 848 S.W.2d 150, 159 (Tex.Crim.App. 1993).

[36] *See e.g., Aguilar v. Anderson*, 855 S.W.2d 799, 815 (Tex.App.– El Paso 1993, writ den'd) (Barajas, J., *concurring and dissenting*)("Justice is impartiality which is served only if all citizens are seen as equals in the courts that adjudicate their rights.").

[37] *7; *26 (Keel, J., *dissenting*)("Rather than confront that issue, however, the majority brushes it off.").

[38] *See* p. 3, n. 7, *supra*. The majority's embrace of the one-size-fits-some Collin County cap has been rejected on due process grounds by several courts of last resort. *See Makemson v. Martin County*, 491 So. 2d 1109, 1111 (Fla. 1986); *State v. Young*, 172 P.3d 38, 143 (N.M. 2007); *Arnold v. Kemp*, 813 S.W.2d 770, 776 (Ark. 1991). While not binding, this Court has frequently relied on authority from other jurisdictions in resolving questions of first impression in cases such as this.

[39] Tex. Govt. Code, § 311.023(5)("STATUTE CONSTRUCTION AIDS. In construing a statute, *whether or not the statute is considered ambiguous on its face*, a court may consider among other matters the ... consequences of a particular construction.")(emphasis added).

absurd result far beyond Relator being paid quasi-minimum wage for all of his 2016 pre-trial work. Rehearing is required to address this claim.

B. Article 26.05(c) Cannot be Reconciled With 26.05(a) & 2.07(c)

The majority's holding is premised on its attempt at harmonizing the plain and unambiguous language of Articles 26.05(a) and 2.07(c) with what it posits is the equally plain and unambiguous language of 26.05(c).[40] But its reasoning is fatally flawed for two reasons: first, by divorcing the text of these provisions from all context, this allegedly plain text is merely pretext[41]; second, as the dissenters make clear, the plain language of these three statutes suffers from more undeniable, irreconcilable, and internal conflict than a dozen episodes of *Keeping Up with the Kardashians.*

- "[T]his Court's majority opinion improperly legislates from the bench by construing Article 26.05 in a manner that disregards the Legislature's mandate and the Collin County district judges' fee schedule provisions that each require *the payment of reasonable fees to all appointed attorneys.*" ... [T]he majority opinion's interpretation of Article 26.05, as applied here, eviscerates the reasonableness

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[40] **5-7.

[41] *See Cadena Comercial v. Alcoholic Beverage*, 518 S.W.3d 318, 353 (Tex. 2017)(Willett, J., *dissenting*)(citations and footnotes omitted)("It is said that text without context is pretext."); *see also Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892)("It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.").

requirement in subsection (a)..."[42]

- "Collin County's one-size-fits-some scheme makes it impossible to pay a reasonable attorney's fee based on the variables listed in Article 26.05(a) in time-consuming and complex cases, and its fixed fee schedule fails to state reasonable fixed rates or minimum and maximum hourly rates as required by Article 26.05. ... [T]he majority renders Texas Code of Criminal Procedure Article 2.07(c) a dead letter by *setting up the possibility of paying appointed attorneys pro tem differently than appointed criminal defense* attorney*s*."[43]

- "[W]hen it comes to the actual payment of attorneys pro tem, *it seems obvious that article 2.07 and article 26.05(a) take higher precedence than article 26.05(c).*"[44]

Seeking to quell these concerns, the majority posits that, "Even if we were to assume that Article 26.05 is ambiguous," it nonetheless divests trial judges of their inherent discretion to pay pro tems and indigent-defense counsel reasonable fees – a lodestar of the criminal justice system – because the statute requires payment at either a fixed rate or maximum and minimum hourly rates.[45] But this holding is clearly foreclosed by the

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[42] **14, 20 (Alcala, J., *dissenting*)(emphasis added).

[43] *24 (Keel, J., *dissenting*)(emphasis added).

[44] *29 (Walker, J., *dissenting*)(emphasis added).

[45] *6 n. 56.

overarching principle that the separation of powers doctrine the majority did not address clearly trumps the teachings of Messrs. Scalia and Garner upon which the majority relies[46] in voiding Rule 4.01B. This safety valve provision adopted by two-thirds of Texas counties was both necessary and proper to vest trial judges with the "inherent power to compel payment of sums of money if they are reasonable and necessary in order to carry out the court's mandated responsibilities."[47] Indeed, in this politically-charged case of first impression, "[t]his inherent power is also necessary to protect and preserve the judicial powers from impairment or destruction."[48]

At the end of the day, whether the Commissioners' ploy of trying to derail Paxton's prosecution by cutting off its funding can withstand strict scrutiny before this Court was answered almost four decades ago by Texas Supreme Court Justice Franklin Spears. In taking a stand for trial judges across Texas, and reaffirming the fundamental tenet that the Legislature is not the toughest kid in the schoolyard free to beat up the judiciary and take its lunch money with impunity, Justice Spears embraced the very

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[46] *See* *6 nn. 49, 55; *8 n. 64.

[47] *Vondy v. Commissioners Court of Uvalde Cty.*, 620 S.W.2d 104, 109 (Tex. 1981).

[48] *Id.*

separation of powers argument this Court has not yet addressed:

> The legislative branch of this state has the duty to provide the judiciary with the funds necessary for the judicial branch to function adequately. If this were not so, a legislative body could destroy the judiciary by refusing to adequately fund the courts. *The judiciary must have the authority to prevent any interference with or impairment of the administration of justice in this state.*[49]

This Court can give true meaning to Justice Spears' sentiments by honoring them, granting rehearing, and reaffirming the judiciary's role as an equal, not subordinate, member of the three branches of government.

C. The Commissioners' Claim is Barred by the Doctrine of Laches

As set out in Relator's petition, the Commissioners' claim is barred by the equitable doctrine of laches.[50] First, the Commissioners' 18-month delay before seeking mandamus relief was clearly unreasonable. Second, their disingenuous ruse of laying behind the log and sleeping on their rights plainly prejudiced Relators, who "continued to work on the Paxton cases, assuming they would continue to be paid $300 per hour" when the

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[49] *Id.* at 110 (emphasis added). Although Relators cited this very quotation on three different occasions, Pet. Mandamus 9, 47, 51, the Court did not discuss or distinguish its holding.

[50] Pet. Mandamus 48-50, *citing Ex parte Perez*, 398 S.W.3d 206, 215 (Tex.Crim.App. 2013); *Ex parte Bowman*, 447 S.W.3d 887, 888 (Tex.Crim.App. 2014)(per curiam).

Commissioners ratified this agreement by paying the first bill without objection.[51] Third, and most important of all, let there be no doubt – Relators would never have accepted the formidable task of prosecuting the Texas Attorney General over the last three-plus years had they been able to look into the future and discern that their pay would come within a coat of paint of minimum wage. That Relators continued to work on the case in good faith "at their own peril," especially after Commissioners ratified the agreement to pay them $300 an hour is not "unfortunate,"[52] it is the very essence of the laches claim the Court has yet to address. Because this matter should not now appear to the Court as it appeared to it when this matter was submitted almost a year ago, rehearing should be granted.[53]

Conclusion

Suppose for a moment the police chief of a small town in the county seat of a small county in West Texas is charged with sexually assaulting a prominent citizen's daughter. If the local District Attorney is recused

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[51] *See* n. 9, *supra.*

[52] *10 (Richardson, J., *concurring*).

[53] *See McGrath v. Kristensen*, 340 U.S. 162, 178 (1950)(Jackson, J., *concurring*)("The matter does not appear to me now as it appears to have appeared to me then ... I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion.").

and nearby district attorneys predictably decline the appointment,[54] the district judge would be compelled to appoint private counsel as pro tems. If that county's fee schedule provide inherently penurious rates or fixed caps, what lawyer with bills to pay would even conceive of accepting such a matter, knowing he or she would likely do battle with a well-financed array of legal talent akin to what Paxton has been blessed to retain.

Suppose the flip side of the same coin: a brutal triple capital murder in a county where fees are equally penurious and the trial judge must find private counsel willing to serve. That a qualified, competent, dedicated lawyer or lawyers would be willing to hold the life of the accused in their hands in this situation is risible. But the majority's decision, as Judge Alcala's dissent makes manifest, plainly invites either of these scenarios.

Dissenting to the majority opinion in *Korematsu v. United States*, Justice Robert Jackson warned that the insidious principle the Court had announced "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[55]

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[54] *See* *12 n. 21 (Richardson, J, *concurring*).

[55] 323 U.S. 214, 246 (Jackson, J., *dissenting*). One of the darkest hours in the Court's history, *Korematsu* upheld the federal government's decision to force over 100,000 Japanese-Americans into

It is not mere hyperbole to suggest that the majority's decision is no less a loaded weapon lying about, "ready for the hand" of any Commissioners Court across Texas "that can bring forward a plausible claim of an urgent need" to derail what it sees as an unjust prosecution by de-funding it.

This Court's heritage is steeped in its deeply-felt belief that as Texas' criminal court of last resort, it has "an independent interest in ensuring... that legal proceedings appear fair to all who observe them."[56] The lens through which the Court, the parties, Mr. Paxton, and the public view this unique case, where statutes, politics, and justice all must be reconciled, compels this Court to grant rehearing to consider all of Relator's claims, and so ensure that these proceedings appear fair to all who observe them.

Prayer for Relief

Relator prays that this Court withdraw its opinion of November 21, 2018, grant this motion for rehearing, set this matter for oral argument,[57] and grant the relief sought by Relator in his petition for mandamus.

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internment camps during World War II.

[56] *Bowen v. Carnes*, 343 S.W.3d 805, 816 (Tex.Crim.App. 2011). The majority's reliance on *Bowen*, *3 n. 21, makes no mention of the paramount principle it announced alluded to above.

[57] *See Ex parte Robbins*, 478 S.W.3d 678 (Tex.Crim.App. 2014)(granting State's motion for rehearing and setting matter for oral argument).

RESPECTFULLY SUBMITTED,

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Certificate of Service

Pursuant to Tex. R. App. P. 9.5(d), I certify that this document was served on all counsel of record via electronic filing on December 21, 2018.

/s/ **Brian W. Wice**

BRIAN W. WICE

Certificate of Compliance

Exclusive of the exempted portions set out in Tex. R. App. P. 9.4(i)(1), this document contains 4267 words.

/s/ **Brian W. Wice**

BRIAN W. WICE